Lee Chong Keong v Cheang Kok Weng & Anor

HIGH COURT (IPOH) — CIVIL APPEAL NO 12–36–94
CHIN FOOK YEN JC
20 NOVEMBER 1995

Damages (Personal Injury or Death) *— Personal injuries — Loss of future earnings and loss of earning capacity — Whether loss of future earnings and earning capacity can be implied where injuries lead to continuing and permanent disability — Whether judge misdirected himself on the scanty medical report — Whether amount of award given for loss of earning capacity was unwarranted*

Civil Procedure *— Appeal — Facts, finding of — Interference by appellate court — Whether appellate court may decide on proper inferences to be drawn from truthful evidence*

Civil Procedure *— Trial — Right of defendant not to give evidence — Whether court was justified in drawing inference of negligence against the defendant on available evidence — Whether judge misdirected himself*

On 19 December 1987, the plaintiff was seriously injured in a motor accident. He was riding on his motorcycle along Jalan Pengkalan Pegoh when he saw two motor cars coming from the opposite direction. The second car, driven by the first defendant ('vehicle PR'), was attempting to overtake the first car, driven by the second defendant ('vehicle AM'). The plaintiff swerved to the left into an open area. At the same time, the first defendant also drove across the road into the same open area, wanting to avoid a head-on collision with the plaintiff. The plaintiff and vehicle PR collided, with the plaintiff sustaining serious injuries. At the trial, the second defendant claimed that he had no knowledge of the accident as vehicle AM had been sold to one Mat before the accident. At the end of the trial, the court gave judgment to the plaintiff, holding the first defendant 100% to blame for the accident. The first defendant appealed against the decisions in respect of the assessment of damages for the plaintiff and non-apportionment of liability with the second defendant.

Held, dismissing the appeal in relation to the plaintiff and allowing the appeal in relation to the second defendant:

(1) In assessing general damages, the future loss of earnings and loss of earning capacity can be implied in law, and is included in cases where the injuries suffered were such as to lead to continuing or permanent disability. The trial judge had not misdirected himself even with the scanty medical report regarding the loss of earning capacity. Being a manual worker, the plaintiff had undoubtedly suffered a set-back for life, especially with some wasting of the right forearm muscles and some shortening of the leg concerned. Therefore, the award of RM12,600 was not unwarranted, and the appeal should not be allowed (see p 138F, I; *Sam Wun Hoong v Kader Ibramshah* [1981] 1 MLJ 295 followed).

(2) The principles guiding an appellate court in dealing with the findings of fact by a court of first instance are where no question arises as to the truthfulness and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an appellate court. However, here, the trial judge did not misdirect himself as a judge of law and of fact (see pp 139D, 140C; *Benmax v Austin Motor Co Ltd* [1955] AC 370; [1955] 2 WLR 418; [1955] 1 All ER 326 and *Montgomerie & Co Ltd v Wallace-James* [1904] AC 73 followed).

(3) Regarding the question of negligence to determine liability, making the best use of the evidence as adduced on record, it was more probable that the second defendant's driver had suddenly swerved onto the main road as maintained by the first defendant. This means that the evidence of the first defendant had raised a prima facie case of negligence on the part of the second defendant (see p 140E–F).

(4) A defendant is not under an obligation to give evidence but he cannot complain if, on a narrow balance of probability, the evidence justified the court in drawing the inference of negligence against him. Here, the failure of the driver to give a statement regarding the accident to the police in the circumstances of the case justified the court drawing the inference of negligence contributing to the accident against the second defendant. Liability was thus apportioned equally between the first and second defendant (see p 140H–I; *Price v Price* (*The Times,* 12 February 1954) (unreported) followed).

(5) It is more probable that a motor car is driven by the owner or his servant or agent and it is prima facie evidence that when driven, it is with the authority of the owner. This is evidence that can be rebutted by proof of the actual facts. Since there was no evidence from the so called Mat, and no evidence of the alleged sale transaction, the second defendant had failed to rebut the prima facie case of agency (see p 141C–E).

[Bahasa Malaysia summary

Pada 19 Disember 1987, plaintif telah mengalami kecederaan parah dalam suatu kemalangan motor. Dia sedang menunggang motosikal di Jalan Pengkalan Pegoh apabila dia ternampak dua buah kereta datang dari arah bertentangan. Kereta kedua, yang dipandu oleh defendan pertama ('kenderaan PR'), sedang cuba memotong kereta pertama, yang dipandu oleh defendan kedua ('kenderaan AM'). Plaintif melencong ke kiri iaitu ke kawasan terbuka. Pada masa yang sama, defendan pertama juga memandu ke seberang jalan memasuki kawasan terbuka yang sama kerana mahu mengelakkan pelanggaran depan sama depan dengan plaintif. Plaintif dan kenderaan PR berlanggar, dan plaintif mengalami kecederaan parah. Semasa perbicaraan, defendan kedua mengatakan bahawa dia tidak

mengetahui apa-apa mengenai kemalangan itu kerana kenderaan AM telah dijual kepada seorang Mat sebelum kemalangan itu. Pada akhir perbicaraan, mahkamah memberikan penghakiman kepada plaintif dengan mendapati defendan pertama 100% bertanggungjawab untuk kemalangan itu. Defendan pertama merayu terhadap keputusan mengenai pengiraan ganti rugi untuk plaintif dan kegagalan mahkamah mengagihkan tanggungan kepada defendan kedua juga.

Diputuskan, menolak rayuan berkenaan plaintif dan membenarkan rayuan berkenaan defendan kedua:

(1) Dalam mentaksir ganti rugi am, kehilangan mata pencarian dan kehilangan keupayaan mendapatkan mata pencarian tersirat dalam undang-undang, dan dimasukkan dalam kes di mana kecederaan yang dialami menyebabkan kecacatan berterusan atau sepanjang hayat. Hakim perbicaraan tidak tersalaharah dirinya walaupun dengan laporan perubatan yang terlalu sedikit mengenai kehilangan keupayaan mendapatkan mata pencarian. Sebagai buruh kasar, plaintif akan menghadapi halangan untuk seumur hidup, terutamanya dengan kesusutan otot lengan kanan bawah dan pendekkan kaki yang berkenaan. Maka, award sebanyak RM12,600 bukanlah tidak wajar, dan rayuan itu tidak patut dibenarkan (lihat ms 138F, I; *Sam Wun Hoong v Kader Ibramshah* [1981] 1 MLJ 295 diikut).

(2) Prinsip-prinsip yang membimbing mahkamah rayuan semasa berurusan dengan fakta-fakta pendapat mahkamah tahap pertama adalah di mana tiada persoalan yang timbul mengenai kebenaran dan di mana persoalan adalah berkenaan inferens yang betul yang disimpulkan daripada keterangan jujur, maka tribunal asal bukan dalam keadaan yang lebih baik untuk membuat keputusan daripada hakim mahkamah rayuan. Bagaimanapun, di sini, hakim perbicaraan tidak tersalaharah dirinya sebagai hakim undang-undang dan fakta (lihat ms 139D, 140C; *Benmax v Austin Motor Co Ltd* [1955] AC 370; [1955] 2 WLR 418; [1955] 1 All ER 326 dan *Montgomerie & Co Ltd v Wallace-James* [1904] AC 73 diikut).

(3) Berhubung dengan persoalan kecuaian untuk penentuan tanggungan, menggunakan dalam cara yang terbaik keterangan seperti yang dikemukakan dalam rekod, besar kemungkinan pemandu defendan kedua telah melencong dengan tiba-tiba ke jalan raya utama seperti yang dikatakan oleh defendan pertama. Ini bermakna keterangan defendan pertama telah membangkitkan kes prima facie kecuaian terhadap defendan kedua (lihat ms 140E–F).

(4) Defendan tiada obligasi untuk memberi keterangan tetapi dia tidak boleh mengadu jikalau, di atas imbangan kebarangkalian, keterangan memberikan justifikasi kepada mahkamah untuk mencapai kesimpulan kecuaian terhadapnya. Di sini, kegagalan pemandu untuk memberi kenyataan mengenai kemalangan kepada polis dalam keadaan demikian memberikan mahkamah

justifikasi untuk mencapai kesimpulan bahawa kecuaian defendan kedua adalah antara sebab terjadinya kemalangan itu. Tanggungan, dengan itu, diagihkan sama banyak di antara defendan pertama dan kedua (lihat ms 140H–I; *Price v Price* (*The Times*, 12 February 1954) (unreported) diikut).

(5) Besar kemungkinan bahawa sesebuah kereta dipandu oleh pemunya atau pekerja atau ejennya dan adalah keterangan prima facie bahawa apabila dipandu, ianya adalah dengan kebenaran si pemunya. Ini ialah bukti yang boleh dipatahkan oleh bukti fakta-fakta sebenar. Oleh kerana tiada keterangan daripada orang yang bernama Mat itu, dan tiada bukti mengenai dakwaan urus niaga jualan, defendan kedua telah gagal mematahkan kes prima facie agensi (lihat ms 141C–E).]

Notes

For cases on personal injuries, see 6 *Mallal's Digest* (4th Ed) paras 328–567; [1989] Mallal's Digest 661–733; [1990] Mallal's Digest 498–575; [1991] Mallal's Digest 970–1036; [1992] Mallal's Digest 849–913; [1993] Mallal's Digest 704–741.

For cases on appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 259–699.

For cases on trial, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3593–3642.

Cases referred to

Sam Wun Hoong v Kader Ibramshah [1981] 1 MLJ 295

Benmax v Austin Motor Co Ltd [1955] AC 370; [1955] 2 WLR 418; [1955] 1 All ER 326

Montgomerie & Co Ltd v Wallace-James [1904] AC 73

Price v Price (*The Times*, 12 February 1954) (unreported)

Appeal from: Summons No 63–735 of 1988 (Sessions Court, Ipoh)

Asbir Kaur Sangha (*Asbir, Hira Singh & Co*) for the appellant.
CK Leong (*CK Leong & Co*) for the first respondent.
Suresh Harikrishna (*Lim Him Wee & Co*) for the second respondent.

Cur Adv Vult

Chin Fook Yen JC: In this motor accident case, the plaintiff brought a claim for loss and damages against only the first defendant who, disputing both liability and quantum, at the same time brought in the second defendant against whom negligence is to be imputed.

In summary, their versions of the accident are as follows. On 19 December 1987 just after midday, when the plaintiff was riding his motorcycle No AV2644 ('the motorcycle') along Jalan Pengkalan Pegoh towards the direction of Ipoh Town centre, he saw two motor cars coming from the opposite direction. The second car, later identified as No PR4040

('vehicle PR') driven by the first defendant in an attempt to overtake the first car No AM2666 ('vehicle AM') later revealed as that of the second defendant, encroached on his path. He swerved to the left into an open area. Nevertheless, vehicle PR collided into him. On impact, he lost consciousness. On cross-examination, plaintiff maintained that vehicle PR overtook vehicle AM when the latter was on the main road and not, as alleged by the first defendant, just starting to move from the edge of the road. The plaintiff also admitted that the part of the road was wide enough for two cars to travel on each side and at the material times traffic was not heavy.

In his evidence, the first defendant stated that he saw vehicle AM, 'Berhenti di tepi jalan, setengah bahagian kereta berada di atas jalan manakala setengah yang lain berada di atas jalan pasir. Beberapa orang Melayu berdiri di sebelah kiri kereta tersebut. Mereka sedang berbual-bual.' So, he overtook vehicle AM which was stationary. At that point of time, he could see the motorcycle approaching. He continued, 'Setelah nampak motosikal itu, saya masih memotong kerana dari pengalaman saya dan kepada kereta yang berhenti di tepi jalan, saya boleh memotongnya.' As he was overtaking, vehicle AM moved out from the edge onto the main road. To avoid an accident, he swerved to the right. Just then the motorcycle confronted him. He thought that if he was to proceed straight ahead, there would be a head-on collision with the motorcycle. As there was an open area on the other side of the road, he drove across the road and entered into the open area believing that would avoid a head-on collision, little realizing the plaintiff also headed towards the same area, where the two of them collided with each other. In the course of overtaking, he said, 'Bahagian belakang sebelah kiri kereta saya terkena pada bahagian hadapan kereta yang saya mahu memotong itu.' The first defendant called his witness, a sergeant from the traffic branch, Ipoh who testified:

(i) that he examined vehicle PR at the scene and found, inter alia, 'madgad kiri belakang kemek sedikit.' He confirmed that the damage to the mudguard was not caused by the lamp-post; and

(ii) that vehicle AM according to the second defendant, the registered owner, was 'digunakan oleh anak saudaranya, nama Mat.' The sergeant told the second defendant 'untuk memberitahu pada Mat supaya datang ke balai trafik, Ipoh berjumpa dengan saya. Mat tidak ada datang berjumpa saya' for inspection.

The second defendant was very brief with his testimony. He told the trial court that he had no knowledge of the accident on 19 December 1987 as vehicle AM had earlier on 30 November 1987 been sold to Mat. Under cross-examination, he said that he had informed Mat to call at the police station and would not know if Mat had acceded to the request. He further said that after receiving cash for the sale of vehicle AM, he 'tidak bertanyakan En Mat kenapa kereta ini masih didaftar dalam nama saya.' To top them all, he told the trial court that Mat 'telah meninggal dunia. Saya lupa tarikh kematiannya.' What I have stated above was the substance of the case for the parties, if I have not seriously erred.

At the end of a full trial, the court gave judgment to the plaintiff, with costs to both the plaintiff and the second defendant, holding the first defendant 100% to blame for the accident. The first defendant was dissatisfied with the decisions in respect of both the plaintiff and the second defendant and now appeals. A

On appeal, in respect of the plaintiff, the first defendant was discontented with only the award for loss of earning capacity at RM150 per month for a period of seven years, whilst conceding the other issues. B

Pertaining to his income, the plaintiff testified that he worked for a contractor who in his evidence confirmed that he was paid RM1,000 per month. After the accident, he engaged a helper to whom the plaintiff paid RM500 per month. The plaintiff, aged 43 at the trial, a mason by occupation had suffered the following injuries: C

(1) closed comminuted fracture of the lower end of the right radius;

(2) closed comminuted fracture of the upper ⅓ of the right tibia;

(3) closed fracture of the lower ⅓ of the left femur; D

(4) fracture of the right ilium, bilateral superior and inferior rami of the pelvis; and

(5) intra-abdominal injury.

From the evidence aforesaid, the trial court assessed his loss of earning capacity at RM150 per month. And in view of the serious injuries sustained, the court awarded the period of seven years. E

The principles guiding the compensation for pecuniary loss for general damages can also be found in the case *Sam Wun Hoong v Kader Ibramshah* [1981] 1 MLJ 295 where Mohamed Azmi J (as he then was) delivering the judgment of the then Federal Court said at p 297: F

> General damage comprises damages for pain and suffering, loss of amenities and the like which the law implies, and in certain cases where the injuries suffered are such as to lead to continuing or permanent disability, it includes future loss of earnings and loss of earning capacity. Under the heading of pain and suffering and loss of amenities, the quantum is mainly assessed on G
> the nature of injuries sustained and the period of hospitalization, and in arriving at a figure, the court is guided by previous awards in cases involving similar type of injuries with allowances being given as to the plaintiff's age, marital status, his special position socially or in business, depreciation or appreciation of money value and other relevant circumstances. As regards loss of future earning and future loss of earning capacity, although such loss H
> can be implied in appropriate cases, the award should be a nominal one, unless the plaintiff can prove such future loss is in fact sufficiently severe to warrant a substantial award.

As clearly enunciated in the case above, such loss of earning capacity in law can be implied. As such, I find the trial court had not misdirected itself even with the scanty medical report in that respect. Being a manual worker, the plaintiff undoubtedly suffered a set-back for a long time to come if not for life, especially with some wasting of the right forearm I

muscles and some shortening of leg concerned. An award of RM12,600 estimated as such was not unwarranted. This ground of appeal must fail.

Now, the appeal in respect of the second defendant involves only the issue of liability. The first defendant submitted that the collision resulting in damages and loss to the plaintiff was entirely caused or alternatively substantially contributed to by the negligence of the second defendant. The first defendant stoutly contended in short that had the second defendant not suddenly swerved his vehicle AM encroaching into his path, the accident would not have occurred, thus alleging negligence on the part of the second defendant who, as stated earlier in my judgment, denied any knowledge of the accident. Counsel for the second defendant relied solely on the decision of the trial court, on a finding of fact which he urged should not be disturbed by an appellate court.

I find the case of *Benmax v Austin Motor Co Ltd* [1955] AC 370; [1955] 1 All ER 326; [1955] 2 WLR 418 particularly helpful as to the principles guiding an appellate court in dealing with findings of fact by a court of first instance. Lord Simmons began with the case of *Montgomerie & Co Ltd v Wallace-James* [1904] AC 73 in which Lord Halsbury LC said at p 75:

> But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an appellate court.

Lord Simmons continued:

> This does not mean that an appellate court should lightly differ from the finding of a trial judge on a question of fact, and I would say that it would be difficult for it to do so where the finding turned solely on the credibility of a witness. But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts. An example of this distinction may be seen in any case in which a plaintiff alleges negligence on the part of the defendant. Here, it must first be determined what the defendant in fact did and, secondly, whether what he did amounted in the circumstances (which must also so far as relevant be found as specific facts) to negligence. A jury finds that the defendant has been negligent, and that is an end of the matter unless its verdict can be upset according to well-established rules. A judge sitting without a jury would fall short of his duty if he did not first find the facts and then draw from them the inference of fact whether or not the defendant had been negligent. This is a simple illustration of a process in which it may often be difficult to say what is simple fact and what is inference from fact, or, to repeat what I have said, what is perception, what evaluation.

Coming back to the case at hand, it must first be determined what the first defendant in fact did. According to his estimate, he was driving at 50 km/h, but he admitted he did not look at the speedometer. However, the plaintiff testified that the first defendant approached him at a fast speed.

The impact took place well on the plaintiff's side of the road. From the appeal record, the trial court made its own perception and evaluations as follows: A

(1) Kemalangan berlaku semasa defendan pertama memotong kenderaan AM2666 ...

(2) Semasa memotong kenderaan AM2666 ini, kereta defendan pertama PR4040 telah memakan jalan sah SP1 (the plaintiff). B

(3) Defendan pertama telah memandu keretanya dengan laju.

The trial court did not misdirect itself as a judge of law and as a judge of fact, it found the first defendant negligent and that was the end of the matter, as conceded by the first defendant, in so far as the plaintiff was concerned. C

In respect of the second defendant, the appeal involves only the issue of liability. To find liability, the first defendant would have to establish:

(i) the driver of vehicle AM was negligent as alleged; and D

(ii) vicarious liability against the second defendant.

The trial court was then obliged to ask the second defendant's driver, the same questions in view of the stand taken by the first defendant. According to the first defendant, on seeing vehicle AM encroaching into his path he swerved to the right, in the course of which vehicle PR was grazed on the nearside rear mudguard. The sergeant confirmed this. And the trial court totally failed to consider the aspect of the dented mudguard. In such a case, it is the duty of the appellate court to make up its own mind, making the best of the evidence as adduced on record. In my opinion, it was more probable that the second defendant's driver had suddenly swerved onto the main road as maintained by the first defendant for the following reasons. That part of the road was wide enough for two vehicles travelling abreast in the same direction. As such there was no reason to encroach on the other side in overtaking, unless the second defendant's driver moving from the stationary position took up a greater part of the road, resulting the two vehicles to graze each other, as was evidenced, leaving the first defendant no choice in the circumstances. The evidence of the first defendant raised a prima facie case of negligence on the part of the second defendant's driver. E F G

In the case of *Price v Price* (*The Times,* 12 February 1954) (unreported), the defendant elected to give no evidence, when the police officer gave evidence of the long brake marks. In dismissing the appeal, the Court of Appeal held that: H

> In such a case as this, the defendant was not under an obligation to give evidence, but if he chose not to do so, he could not complain if on a narrow balance of probability the evidence justified the court in drawing the inference of negligence against him. I

In the instant case, the driver was available at the material times, at least to give a statement regarding the accident to the police. The failure on his part to do so, and in the absence of any evidence in rebuttal, the

A circumstances of the case justified the court to draw the inference of negligence contributing to the accident against the driver.

On the question of vicarious liability, it was not in dispute that vehicle AM was registered at Jabatan Pengangkutan Jalan ('JPJ') concerned with the second defendant as owner at all times. The second defendant B admitted this in his evidence. In the instant case, the second defendant alleged that vehicle AM had been sold by him to one Mat, his relative. There was no evidence whatsoever to show the transaction, no document to show transfer, no receipt to show sale, no evidence documentary or otherwise to reveal the full particulars of Mat, or when he died, if he died. In short, there was no evidence of Mat or the sale transaction, except the C bare allegation of the second defendant. In the circumstances of the case, the fact of ownership as evidenced by JPJ had remained unrebutted.

In a motor accident claim such as this, it is more probable that a motor car is driven by the owner or his servant or agent and, therefore, it is prima facie evidence that when driven, it is with the authority of the D owner. But it is evidence that can be rebutted by proof of the actual facts. The second defendant could have tilted the scale in his favour with a statement from the so-called Mat whose complete absence from the scene throughout remained a mystery and certainly not being helpful to the second defendant to rebut the prima facie case of agency. In the event, I find that the second defendant had failed to rebut what was rebuttable.

E

I would like to mention one other thing about the first defendant's police report No 20119/87 in connection with the use of the word 'Kemudian'. The report stated, inter alia, 'sebuah motosikal ... dari arah depan dan telah berlanggar dengan motokar saya. Kemudian motokar yang jalan semula itu tadi telah melanggar bahagian belakang motokar F saya di sebelah kiri.' In the context of the accident, by the time the motor cycle and vehicle PR had collided, the both of them were already on the other side of the road. Why would vehicle AM proceed to the other side to knock at vehicle PR? I accept the first defendant's explanation that when he made the report he was in the state of 'kelam kabut'. The word G 'kemudian' was in my opinion superfluous.

In the circumstances of the case, I find the cause of the accident was substantially contributed to by the second defendant. I, therefore, apportion liability equally between the first defendant and the second defendant. The order of the court below is set aside to this extent. Costs to the plaintiff here and in the court below to be borne by the first and second H defendants equally. Costs to the second defendant awarded by the court below against the first defendant is set aside.

Order accordingly.

Reported by Angela Ho

I